Supreme Court, U.S.
FILED
981074 DEC 3 1998
OFFICE OF THE CLERK

No. 98-

IN THE

Supreme Court of the United States

OCTOBER TERM 1998

CITY OF SANTA BARBARA,

Petitioner,

v.

VICKIE L. EDWARDS, KATHLEEN ROSE MCCAULLEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DANIEL J. WALLACE
CITY ATTORNEY
Counsel of Record
JANET K. MCGINNIS
ASSISTANT CITY ATTORNEY
Post Office Box 1990
Santa Barbara, CA 93102-1990
(805) 564-5331

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS ◆ WASHINGTON, D.C. ◆ 1-800-347-8208

QUESTION PRESENTED

Whether an ordinance that prohibits impeding or hampering another's access to medical facilities and places of worship by requiring a person to step back eight feet upon a specific request within a limited access area, is a constitutional time, place, and manner regulation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINION BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 8

I. THE NINTH CIRCUIT HAS UNDULY RESTRICTED LOCAL GOVERNMENT RESPONSE TO ONGOING PROBLEMS OF OBSTRUCTION AND HARASSMENT 8

II. THIS COURT NEEDS TO GUIDE CITIES BY DEFINING A CONSTITUTIONAL ZONE OF SEPARATION 13

III. THIS BACK AWAY PROVISION IS A VALID LEGISLATIVE CHOICE 16

CONCLUSION 18

Page

APPENDICES

APPENDIX A: *Edwards v. City of Santa Barbara* 150 F.3d 1213 (9th Cir. 1998) 1a

APPENDIX B: *Edwards v. City of Santa Barbara* Ninth Cir. No. 95-568790, Order, October 6, 1998 ..... 8a

APPENDIX C: *Sabelko v. City of Phoenix* 120 F.3d 161 (9th Cir. 1997) 10a

APPENDIX D: Santa Barbara Municipal Code Chapter 9.99 ..... 19a

TABLE OF AUTHORITIES

Page(s)

CASES

Czekaj v. California, slip op. (Sup. Ct. Santa Barbara Co., App. Dep't), *appeal denied*, 2d Crim. No. B090057, slip op. (Cal.App. 2d Dist.), *cert. denied,* 516 U.S. 808, 116 S.Ct. 53 (mem.)(1995) 5

Edwards v. City of Santa Barbara, 883 F.Supp. 1379 (C.D. Cal. 1995)(*Edwards I)* 6

Edwards v. City of Santa Barbara, 150 F.3d 1213 (9th Cir. 1998)(*Edwards III)* 2, 7, 11

International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) 8

Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994) 5, 6, 13, 14

Planned Parenthood v. Aakhus, 14 Cal.App.4th 162, 17 Cal.Rptr.2d 510, *rev. denied* (Cal. Sup. Ct. 1993) . . 10

Sabelko v. City of Phoenix, 68 F.3d 1169 (9th Cir. 1995)(*Sabelko I)* 6

Sabelko v. City of Phoenix, ____ U.S. ____, 117 S.Ct. 1077 (1997)(mem.) 6

Sabelko v. City of Phoenix, 120 F.3d 161(9th Cir. 1997)(*Sabelko II)* 6, 7, 11

Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997) 6, 7, 11, 13, 14, 15, 17

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 12

Table of Authorities (continued)

Page(s)

STATUTES

First Amendment to the United States Constitution 2

28 U.S.C. § 1254 2

42 U.S.C. § 1983 5

MISCELLANEOUS

Santa Barbara Municipal Code §9.99.010 2

Santa Barbara Municipal Code §9.99.020 ..... 3, 4, 16, 17

Santa Barbara City Ordinance 4812 (1993) 4

IN THE

Supreme Court of the United States

OCTOBER TERM 1998

CITY OF SANTA BARBARA,

Petitioner,

v.

VICKIE L. EDWARDS, KATHLEEN ROSE MCCAULLEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner City of Santa Barbara respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on August 11, 1998.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 150 F.3d 1213 (9th Cir. 1998). App. A, *infra.*

JURISDICTION

The Ninth Circuit opinion was entered on August 11, 1998. A timely petition for rehearing was denied on October 6, 1998. App. B, *infra.*

This Court has jurisdiction under subdivision (1) of section 1254 of title 28 of the United States Code.

STATUTES INVOLVED

The First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right to the people peaceably to assemble, and to petition the government for a redress of grievances.

Subsection (A) of section 9.99.010 (Definitions) of the Santa Barbara Municipal Code provides in pertinent part:

> As used in this Chapter, the following terms and phrases shall have the indicated meaning:
>
> A. Access Area. Any portion of a public street or other public place or any place open to the public within one hundred (100) feet of the premises of a health care facility or place of worship.
>
> ....

Section 9.99.020 (Impeding Access Prohibited) of the Santa Barbara Municipal Code provides:

A. DEMONSTRATION ACTIVITY – OBLIGATION TO WITHDRAW. No person, in the course of demonstration activity within the access area of a health care facility or place of worship, acting alone or in concert with others, shall impede or hamper the free access to or departure from any health care facility or place of worship by failing to withdraw immediately to a distance of at least eight (8) feet away from any person who has requested such withdrawal. "Impede" or "Hamper" means to obstruct, hinder or delay.

B. WITHDRAWAL. For purposes of this Section, withdrawal may be requested by a person verbally, or by carrying or wearing a visible sign clearly indicating such withdrawal request. Statements by a person, or signs carried or worn by a person displaying words or symbols such as or similar in effect to "stop," "stop it," "withdraw," "back off," "get away," or "leave me alone" shall be sufficient to constitute a request to withdraw under this Section. Failure to comply immediately with any such request shall constitute a violation of this Section. Mere statements of opinion or disagreement made in the absence of a request to withdraw shall not be construed to be a request to withdraw under this Section.

C. DISTANCE. Distance under this Section shall be measured from that part of the closest demonstrator's body that is nearest to the closest part of the requesting person's body. For purposes of the preceding sentence, the term "body" shall

> include any natural or artificial extension thereof, including, but not limited to, an outstretched arm or a handheld sign.

Santa Barbara City Ordinance 4812 (1993).

STATEMENT OF THE CASE

After years of persistent and escalating obstructive demonstration activities, in May 1993 the Santa Barbara City Council unanimously enacted an ordinance to promote unfettered access to people exercising their constitutional rights to seek medical care and to worship at the place of their choice.

Ordinance 4812, codified as Chapter 9.99 of the Santa Barbara Municipal Code, prohibits impeding access to health care facilities and places of worship. Section 9.99.020, the subject of this Petition, requires a demonstrator who is impeding access of another within one hundred feet of a medical or religious facility to back off eight feet if a person specifically requests the space. Disagreements or arguments do not require withdrawal. The demonstrator is not silenced by a request and continues to demonstrate through and from the eight feet. The person asking for the space may talk to or listen or reach out for a leaflet from a demonstrator who backs away. App. D, *infra*. The eight feet of separation allows speech from an acceptable conversational distance.

Other tools may exist to dampen the volatility and harm of intimidation and obstruction tactics; however, Santa Barbara selected two narrowly tailored and effective measures to respond to these problems. During the two years it was enforced before it was enjoined, the ordinance buffered confrontations between competing fundamental interests while speech continued to be seen and heard

through the eight foot zone of separation.[1] For two years this local legislation reduced face-to-face intimidation and abuse because it distanced by eight feet shouting, screaming, or obstructing demonstrators.[2]

Respondents brought suit under section 1983 of Title 42 of the United States Code challenging the constitutionality of the eight foot back away provision, as well as the provision

---

[1] Photographs confirm common experience that speech continues when one is eight feet from a targeted listener. Clerk's Record 16 at 78-86 (hereafter "CR"). Respondent Edwards's and others' declarations (CR 79; CR 16 at 37-48) and police reports, citations, photographs, and videotapes show that lively demonstrations continued during the time the ordinance was enforced and that the ordinance abated obstruction and intimidation tactics. CR 16 at 87-88, 91-102; CR 47 at 1-5, 12-14, 16, 19-22, 27-29, 34, 36, 39, 41, 47-49, 51, 55, 57, 61, 66, 71-73, 75, 80, 83, 88, 92, 98-100, 106, 109-10, 114, 117, 124, 126-29, 136, 140, 145-46, 148, 159-60, 163-64, 174-76, 184, 185, 187, 190, 194, 200-01, 204, 205, 207, 208, 214, 215, 218, 223, 229, 232, 237-38, 247, 249, 253, 255-56, 258, 264, 267, 275, 277, 281, 283, 288, 290-91, 293-95, 298, 300, 305, 307, 309, 311, 315, 322-23, 325, 329-30, 333, 335, 345, 347-48, 353, 368, 370, 378, 379, 381, 385, 387, 389-90, 397, 399, 405, 411-12; CR 48 at 425, 427, 430, 459, 462, 468, 470-71, 474, 476-78, 480-81, 483-85, 488, 491-93, 495-99, 502, 504-07, 515-18, 520-23, 525-27, 541, 544, 545, 548, 555-56, 558, 573, 577-80, 583, 585, 588, 590-91, 598, 600-02, 607, 609, 619-24, 626-27, 629-30, 636, 638, 643-44, 671, 676-79, 682, 685, 688, 694-96, 698-700, 704, 706-08, 710, 713-16, 720-21, 729, 736-38, 743-45, 773, 777-78, 811, 813-16, 819-21, 824, 826-27; CR 77 at 6, 8, 10, 12, 14, 16, 24, 26, 27, 30, 32, 33, 36, 38-40, 42, 43, 48 53, 55-57.

[2] Respondents were never prosecuted under the ordinance, and regularly demonstrated. CR 79; CR 8; CR 9; CR 55; CR 56; CR 67. Enforcement resulted in 111 citations. *See* footnote 1, *supra*. Criminal convictions withstood constitutional challenge under *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). *Czekaj v. California*, slip op. (Sup. Ct. Santa Barbara Co., App. Dep't), *appeal denied*, 2d Crim. No. B090057, slip op. (Cal.App. 2d Dist.), *cert. denied*, 516 U.S. 808, 116 S.Ct. 53 (mem.) (1995).

that created an eight foot buffer zone around driveways to the facilities. The district court denied their request for a preliminary injunction and held that the eight foot driveway buffer and back away provisions were content neutral and narrowly tailored restrictions that furthered substantial government interests and provided ample speech alternatives. CR 22.

However, after this Court decided *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), Respondents renewed their motion and the district court then enjoined the driveway buffer and the back away provision. *Edwards v. City of Santa Barbara*, 883 F.Supp. 1379 (C.D. Cal. 1995) (*Edwards I*). The City appealed.

In November 1995 the United States Court of Appeals for the Ninth Circuit vacated the preliminary injunction and remanded for reconsideration in light of *Sabelko v. City of Phoenix*, 68 F.3d 1169 (9th Cir. 1995) (*Sabelko I*). *Sabelko I* upheld a Phoenix, Arizona ordinance with an eight foot back away provision at medical facilities; therefore, on remand the district court now approved the eight foot back away provision at medical facilities. However, the district court continued to enjoin the back away provision at places of worship and the eight foot driveway buffer at both locations. CR 164. So, the City appealed again.

In February 1997 this Court vacated *Sabelko I* and remanded for reconsideration in light of *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997). *Sabelko v. City of Phoenix*, ___ U.S. ___, 117 S.Ct. 1077 (1997)(mem.).

On remand, the Ninth Circuit enjoined the Phoenix ordinance, reversing *Sabelko I*. *Sabelko v. City of Phoenix*, 120 F.3d 161, 165 (9th Cir. 1997) (*Sabelko II*); App. C,

infra. As a result, Respondents renewed their motion for a preliminary injunction against the back away provision at clinics in the Santa Barbara ordinance. The district court enjoined its enforcement and again the City appealed.

In August 1998 the Ninth Circuit reversed in part, affirmed in part, and vacated the awards of attorney fees and costs. It found that the ordinance was content neutral and upheld the eight foot driveway buffer as a constitutional time, place, and manner regulation. However, simply citing *Sabelko II* without analysis, the court of appeals enjoined the moving eight foot back away provision. *Edwards v. City of Santa Barbara*, 150 F.3d 1213, 1215-17 (9th Cir. 1998) (*Edwards III*); *see* App. A, *infra*.

In both *Sabelko II* and *Edwards III* the court of appeals made an erroneous and rote equation of the back away provisions in the Phoenix and Santa Barbara ordinances with the substantially different moving fifteen foot injunction provision that this Court invalidated in *Schenck*. The court of appeals did not adequately consider or apply the different First Amendment tests to evaluate an ordinance and an injunction. Nor did the court of appeals analyze how the "back away upon request" provision in the Santa Barbara ordinance is similar to the "cease and desist" requirement that this Court *upheld* in *Schenck*. *Schenck*, *supra*, at ___, 117 S.Ct. 870.

This Petition seeks review only of the portion of the Ninth Circuit decision enjoining enforcement of the eight foot back away provision.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit has Unduly Restricted Local Government Response to Ongoing Problems of Obstruction and Harassment

Santa Barbara, Phoenix, and the city *amici* supporting this petition need effective tools to promote order and safety when demonstrators overstep the bounds of legitimate protest and try instead to thwart others from exercising their competing constitutional interests by blocking their access, getting in their way, stalking them, and trying to intimidate them by screaming at close range and refusing to stop. As this Court has recognized, this behavior presents risks of duress and coercion that may appropriately be regulated. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 684 (1992). Throughout this nation, demonstrators have resorted to "in-your-face" tactics of harassment, obstruction, and interference with people trying to use health care clinics and places of worship. This is a persistent problem confronting American cities, which find traffic safety endangered, harassment complaints escalating, fist-fights erupting on their streets, and citizens clamoring to city councils and police for a solution to defuse the danger and tension. The record below, chronicling the problems that plagued Santa Barbara, reports a common experience on sidewalks and streets. When, as the record here shows, demonstrators persist in nose-to-nose harangues or wave large signs in front of others' faces or vehicles, the targeted people cannot pass freely or safely and often become intimidated or terrorized or strike out to stop the unwanted harassment.

During early 1993 the Santa Barbara City Council was pressed to respond to volatile and escalating local activities at health care facilities and places of worship. The national anti-

abortion direct action group Operation Rescue had begun a national and state campaign, "No Where to Hide," which targeted congregations and religious facilities attended by physicians who performed abortions. Operation Rescue and its local adherents had staged intimidating activities at the church of a Santa Barbara physician.[3] The demonstrators interfered with congregates' access to the church, blocked their path, screamed at them, and refused to back away. The demonstrators also threatened the congregation that their harassing and intimidating disruptions would continue unless they expelled the physician from the congregation. Meanwhile, intimidating activity escalated at the clinic where the doctor performed surgery. The clinic's location in the midst of downtown on a busy street that is the primary access route to a freeway raised traffic safety concerns.[4] Driveway congestion, which then backed up street traffic, and driver stress occurred daily because demonstrators formed gauntlets with their bodies and large signs, yelled at drivers, threw unwanted materials in windows, and approached and obstructed cars waiting in the street to enter the driveway. These very close encounters caused disputes, fights, anger, stress, and fear.[5] Years earlier,

---

[3] *See, e.g.*, CR 16 at 44: 25-28, 45, 46: 1-15; 72-76, 47: 9-28, 90-93, 99-102, 111-13, 118-19; CR 49 at 895-96, 964, 984, 1022, 1026, 1032-41, 1049-51, 1095-96, 1118, 1198: 11-26, 1199: 1-20, 1199: 23-26, 1200-01, 1206: 3-26, 1207: 1-13, 1210: 22-16, 1211: 1-23, 1212: 14-26, 1214: 21-26, 1215: 1-14, 1216: 16-22, 1219: 13-26, 1220: 1-10, 1221: 13-26, 1222: 1-5, 1223: 4-20, 1224: 21-26, 1225: 1-6, 1226: 15-26, 1231: 6-19, 1232: 6-20, 1233: 16-26, 1234: 1-13, 1236: 23-26, 1237: 1-12, 1238: 17-26, 1239: 1-7, 15-26, 1240: 1-2, 6-26, 1241: 1-19, 22-24, 1242: 1-12.

[4] CR 16 at 37: 26-28, 38: 1-20, 41, 47: 21-28.

[5] *See, e.g.*, CR 16 at 45: 16-28, 46: 1-15, 47: 9-28, 72-74, 75, 76, 92, 93, 100-102; CR 49 at 896, 1022, 1050, 1051, 1096, 1199, 1210-11, 1224-25, 1233-34, 1236-37, 1242.

the clinic had obtained federal and state injunctions prohibiting blocking and trespassing in an attempt to regulate its access problems. *Planned Parenthood v. Aakhus*, 14 Cal. App.4th 162, 167, 169, 17 Cal.Rptr.2d 510, 512-13, *rev. denied* (Cal. Sup. Ct. 1993). However, the injunctions proved ineffective. Thus, despite the injunctions, obstruction and interference with access continued, and even increased.

The dangerous effects of the intimidation tactics were decried in several public meetings. Citizens called on the City Council to enact an ordinance that would apply to everyone and could be even-handedly enforced by police. Constituents and clergy testified to persistent demonstration activities that were confrontational, intimidating, stressful, and caused traffic hazards. CR 16 at 90-93, 99-102, 111-13, 118-19; CR 49 at 1196-1242, 1251-57. The City Council concluded that these volatile demonstration tactics were a threat to public order and safety and undermined the City's interest in assuring that one person's exercise of constitutional rights does not overwhelm or deprive another's exercise of equally important constitutional rights. In addition to the information gleaned at the hearings, the Council read articles about the adverse psychological, physiological, and medical effects of stress and intimidation, and about cultural needs for a safe zone of personal space in public encounters. The Council then studied legislation of other cities, rejected particular measures enacted by some cities as not sufficiently tailored to the Santa Barbara problems and to the governmental interests at stake, and crafted its own access provisions now codified as Chapter 9.99 of the Municipal Code. CR 16 at 90-119; CR 49.

No differently than Santa Barbara, other local governments need flexibility to respond to persistent campaigns of harassment. However, each community

experiences differently the problems caused by obstructive and intimidating demonstration activities, which themselves vary. As a result, not all communities may find the same tools effective to handle their unique traffic conflicts, location, geographic, physical layout, and dimensions of targeted facilities, or types of demonstration activities. Many disrupted communities, like Santa Barbara, find that anti-trespassing provisions or demonstration-free buffer zones around targeted facilities insufficiently protect the governmental interests in traffic and public safety. This is so because people seeking access to health care facilities or religious institutions are in motion, whether arriving by car, bus, or bicycle or on foot. Within discrete geographical areas around these buildings, people need to be able to move without physical obstruction and mental or verbal abuse Therefore, many cities need a regulatory device that accommodates both the inevitable mobility of people seeking unfettered access and the right of demonstrators to be seen and heard by these people and other passersby. The "back away upon request" provision adopted by Santa Barbara is precisely the sort of narrow but flexible provision that properly accommodates these interests.

In *Schenck*, this Court specifically left open the possibility that government may use a zone of separation measured by a set distance between individuals trying to enter health care clinics and protestors wishing to impede them. *Schenck*, *supra*, at ____, 117 S.Ct. 867. The Ninth Circuit plainly erred when it interpreted *Schenck* to categorically ban any sort of provision establishing a moving zone of separation between protestors and individuals they target for obstruction and harassment. See *Edwards III*, *supra*, 150 F.3d 1215, 1217 (App. A, *infra); Sabelko II*, *supra*, 120 F.3d 165 (*See* App. C, *infra.)* With its sweeping decision flatly prohibiting any form of zone of separation,

even the common-sense anti-harassment "back away upon request" provision adopted by Santa Barbara, the Ninth Circuit has drastically curtailed the flexibility that municipal governments urgently need to craft tailored yet effective responses to volatile, obstructive, and intimidating tactics.

The court of appeals deemed the "back away upon request" ordinance unconstitutional because "other means might exist" to deal with the problems without burdening as much speech. *Ibid.* This determination fails to recognize that little, if any, speech is curtailed by merely requiring an obstructive protestor to back eight feet away from the person he or she is impeding. Moreover, it ignores the venerable standard for reviewing municipal ordinances affecting speech, a standard crafted by this Court with due deference to the local need for flexible regulations carefully tailored to protect significant government interests. As this Court counseled in *Ward v. Rock Against Racism*, 491 U.S. 781, 798-800 (1989), to constitute a reasonable time, place, and manner restriction, an ordinance that regulates speech "need not be the least restrictive or least intrusive means. . . . So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."

This Court should grant this Petition to restore to municipal governments the regulatory flexibility to resort to narrow back away requirements to defuse the potential for violence, intimidation, and obstruction presented by persistent "in your face" tactics. A significant feature of the most egregious behavior that Santa Barbara attempted to limit is the demonstrator's tactic of occupying a target's path of travel while shouting nose-to-nose. Common life

experience teaches that separating people eight feet by requiring the harasser to back away upon request may prevent or stop mental abuse and physical violence. The decision below merits review because it has barred a local government from using such a common sense, modest regulatory approach to an escalating social problem.

II. This Court Needs to Guide Cities by Defining a Constitutional Zone of Separation

In recent decisions, this Court has articulated the permissible constitutional scope of injunctions regulating speech, but this Court has not provided guidance to cities about what they may accomplish through ordinances when they can no longer ignore escalating obstructive demonstrations and constituents' demands for safe and reasonably unfettered access to health care institutions and places of worship. Several other cities have, like Santa Barbara, attempted to respond to this problem by creating *de minimus* zones of separation, which do not prohibit speech, between demonstrators and their targets. The decision below casts doubt on whether such a response is constitutionally permissible and seems to dictate to cities that they must stand aside helplessly while aggressive and obstructive protestors harass and interfere with citizens trying to exercise their right to reach a facility without intimidation, abuse, and obstruction. Thus, not only Santa Barbara but many other cities would benefit from guidance from this Court about the constitutional parameters governing ordinances tailored to respond to abusive tactics.

This guidance is all the more necessary now. As the Ninth Circuit's erroneous decisions illustrate, lower courts are misreading *Schenck* and *Madsen*, which scrutinized injunctions, and applying them without analysis to different

provisions in ordinances. The injunction precedents are insufficient to help local governments devise effective time, place, and manner regulations or to help courts review such measures. As local governments have faced ever varying protest tactics they have perceived the need to adopt regulatory provisions that differ from those reviewed in *Schenck* and *Madsen*; moreover, local governments must adopt such provisions knowing that this Court has not reviewed *any* ordinance that seeks to regulate the escalating social problem of obstructive protest activity.

The Ninth Circuit's decisions have generated confusion and uncertainty among municipal governments, which face significant liability if they resort to a modest back away regulation that has proven effective in volatile and dangerous situations. For example, even though Santa Barbara's back away provision is comparable to the "cease and desist" provision upheld in *Schenck*, the Ninth Circuit would not consider that analogous provision as a yardstick for the City ordinance. It holds *Schenck* to mean that all zones of separation are unconstitutional. It did not analyze the City's back away provision for its similarity to an injunctive measure that was approved in *Schenck*. Having reached its rote conclusion, the Ninth Circuit did not explore what "sort of zone of separation between individuals entering the clinics and the protestors, measured by the distance between the two," the First Amendment will allow in ordinances. *Schenck, supra,* 519 U.S. at ____, 117 S.Ct. 867. Consequently, cities are now uncertain whether they may adopt a type of ordinance that has proven very effective in curtailing abusive, obstructive, intimidating conduct while still permitting robust protest activity.

The Ninth Circuit failed to recognize that not all moving zone of separation provisions are the same or that an

ordinance's provisions should receive a more lenient scrutiny than an injunction's. The City's narrowly tailored eight foot "back away upon request" zone of separation is an example of a measure that should be allowed because it lacks the vagueness or compliance problems that caused this Court to invalidate the injunction in *Schenck*.

The *Schenck* fifteen foot provision was too broad, preventing leafleting and speech from a normal conversational distance and burdening more speech than was necessary to serve the governmental interests. *Id.*, at ___, 117 S.Ct. 866-68. However, the Santa Barbara provision allows leafleting to occur with or without a request to withdraw. If the request is made, the person who made the request may ask for a leaflet or reach out for one. The eight feet of separation does not require silence or that communication or interaction cease. This provision is less broad also because it only affects demonstrators within the one hundred foot access area and a demonstrator does not have to maintain a fifteen foot distance from all persons seeking access. A demonstrator only needs to keep a distance of eight feet from the specific person who requested it.

Importantly, the record here shows that the Santa Barbara ordinance is not burdened by the vagueness of *Schenck*'s moving fifteen foot provision. Here, the back away provision existed during contentious demonstration activity. Nothing in the record implies confusion about how it worked or that Respondents or anyone could not comply with it.[6] One of the citations issued during enforcement was for a violation of the eight foot back away provision. The police report shows that the provision was useful and a *de*

---

[6] Moreover, such hypothetical problems are redressed by prosecutorial discretion or defenses raised in actual cases.

minimus speech restriction that reached only obstructive, interfering, and dangerous conduct. A demonstrator had gone into the street near a clinic and went up to a car occupied by a mother and daughter, which was lined up waiting to enter the driveway to the clinic. As a result of the demonstrator's speech and conduct at and in the passenger window, she was requested to back off. Her response was to leave, return with a sign, and continue shouting next to and into the car as she waved the sign in the windows. The driver become extremely upset and sped into and through the driveway. CR 47 at 126, 128-29.

III. This Back Away Provision is a Valid Legislative Choice

The back away upon request provision is a *de minimus* speech regulation that does not reach mere speech. Speech and conduct are unrestrained without a specific request to back away; until a request is made, face-to-face and nose-to-nose speech may occur. Subsection (B) of section 9.99.020 provides that "[m]ere statements of opinion or disagreement made in the absence of a request to withdraw shall not be construed to be a request to withdraw under this Section." *See* App. D, *infra*.

Furthermore, the specific request to withdraw affects only the demonstrator whose conduct "impedes" or "hampers" free access or egress, defined as "to obstruct, hinder or delay," within the limited one hundred foot access area of a facility. Santa Barbara Municipal Code § 9.99.020 (A); App. D, *infra*. Then, compliance requires an obstructive demonstrator to stay back eight feet from a targeted person, which is a normal public conversational distance. The required "distance" is "measured from that part of the closest demonstrator's body that is nearest to the closest part of the

requesting person's body." Only the closest requested person needs to withdraw. Santa Barbara Municipal Code, § 9.99.020 (C); *see* App. D, *infra*.

This Court *upheld* a similar provision in *Schenck* that allowed demonstrators to go up close to anyone and only required someone to back away to the edge of the fifteen foot buffer zone *if* so requested. *Schenck*, *supra*, at ___, 117 S.Ct. 870. Both the Santa Barbara and the *Schenck* provisions allow fully expressive activities immediately adjacent to the zone of separation. Talking, parading, counseling, singing, shouting, praying, displaying signs, or leafleting continue. Arguably, communication improves after it has been distanced eight feet in the demonstration setting. Regardless, both of these provisions are based on a reasonable assumption that distancing obstruction and intimidation tactics will moderate their damage to their targets and their myriad potential harmful effects on public streets and sidewalks. Thus, local governments need this Court's guidance to enact and enforce useful zones of separation to allow targeted persons unfettered movement in limited access areas.

CONCLUSION

The Court should grant this Petition to advise cities and courts of the constitutional scope of a legislated zone of separation to redress conflicts between competing and equal First Amendment rights.

Respectfully submitted,

DANIEL J. WALLACE
CITY ATTORNEY
Counsel of Record
JANET K. MCGINNIS
ASSISTANT CITY ATTORNEY
Post Office Box 1990
Santa Barbara, CA 93102-1990
(805) 564-5331

Attorneys for Petitioner